OCT 16 1956

JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

NO. 512

ANNE LIVINGSTON BEHR, Petitioner,

v.

MINE SAFETY APPLIANCES COMPANY, a Corporation of the State of Pennsylvania; CARBON MONOXIDE ELIMINATOR CORPORATION, a Corporation of the State of Delaware; CATALYST RESEARCH CORPORATION, a Corporation of the State of Maryland; GEORGE H. DEIKE; WILLIAM P. YANT; JOHN F. BEGGY; JOHN T. RYAN, JR.; W. DENNING STEWART; POTTER BANK AND TRUST CO., Executor of the Estate of Howard Zacharias, Deceased; and JOHN T. RYAN, JR., and JOHN F. BEGGY, Administrators of the Estate of John T. Ryan, Deceased; and JOSEPH H. HIRSHHORN, Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Anne Livingston Behr respectfully prays that a writ of certiorari issue in the above captioned case to review the judgments of the United States Court of Appeals for the Third Circuit rendered therein May 18, 1956 (App. 1-5); Petition For Rehearing denied June 19, 1956 (App. 6).

OPINIONS BELOW

The opinions of the United States District Court for the Western District of Pennsylvania (App. 6-7, 9-10, 13-14) are not reported. The pertinent ones are appended hereto because the Court of Appeals entertained and granted typewritten motions to dismiss the appeal before your petitioner as appellant had an opportunity to print and file them in an appendix therein. The opinion of the United States Court of Appeals for the Third Circuit (App. 1-5) is reported in 233 F. 2d 371.

JURISDICTION

The jurisdiction of this Honorable Court is invoked under Section 1254 of the Judicial Code.

The Court of Appeals denied Petition For Rehearing (App. 6) on June 19, 1956, without opinion. On August 24, 1956, Mr. Justice Burton of this Honorable Court entered an Order extending the time for filing Petition for Writ of Certiorari to and including October 17, 1956.

QUESTIONS PRESENTED

1. Is not an affidavit of prejudice or bias, filed by a party to an action pursuant to Section 144 of the Judicial Code, sufficient when a liberal construction of it shows that the judge whose disqualification is sought is prejudiced and biased not only against the party's cause and counsel but also in favor of the opposing parties and their attorneys?

2. Is not the action of a proper affidavit of prejudice, filed pursuant to Section 144 of the Judicial Code, automatic?

3. When pleadings contain allegations which are impertinent, false and scandalous as to counsel of record, should they be stricken pursuant to Rules 11 and 12(f) of the Federal Rules of Civil Procedure?

4. Does the striking of pleadings pursuant to Rules 11 and 12(f) of the Federal Rules of Civil Procedure render them a nullity?

5. Is not the action of the District Court in denying the motions to strike matter which is scandalous as to plaintiff's counsel, and likewise the action of the Court of Appeals in ignoring said motions to strike, discriminatory as to plaintiff and in conflict with a decision of the Court of Appeals at No. 11,499 wherein allegedly scandalous matter was stricken and impounded although it was pertinent and presumptively as well as assertedly true?

6. Does not the plaintiff's right to discovery pursuant to Rule 26(a) of the Federal Rules of Civil Procedure require that plaintiff's interrogatories for the purpose of discovery be answered before the defendants' interrogatories, even though the latter were filed first by reason of their being filed concurrently with their Answer?

STATUTE INVOLVED

The statutory provision involved in Section 144 of the Judicial Code, 28 U.S.C. Section 144, as follows:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith. June 25, 1948, c. 646, 62 Stat. 898, as amended May 24, 1949, c. 139, sec. 65, 53 Stat. 99.

STATEMENT

Mrs. Anne Livingston Behr, widow, of Newport, Rhode Island, sued the defendants for damages, inter alia, resulting from a conspiracy to defraud her of her rights as a stockholder of the Carbon Monoxide Eliminator Corporation, one of the defendants. Jurisdiction below was based upon diversity of citizenship and an amount in excess of $3,000.00, exclusive of interest and costs. At the outset, a motion of defendants to dismiss the Complaint for failure to state a cause of action upon which relief can be granted was denied.

After numerous procedural difficulties, in the course of which it became obvious that the district judge repeatedly denied Mrs. Behr various rights, including her right to discovery, and repeatedly granted the defendants various "rights" to which they were not entitled, Mrs. Behr filed an Affidavit pursuant to Section 144 of the Judicial Code on December 1, 1955 (App. 7a-10a). The purpose of the affidavit was to have Judge Rabe F. Marsh, Jr. disqualified and removed, based upon his alleged bias and prejudice against her cause and her counsel and in favor of defendants and their attorneys with whom Judge Marsh's brother is associated (App. 1a-10). Nevertheless, Judge Marsh entered an Order on January 3, 1956, striking the affidavit (App. 10). By the time Judge Marsh acted upon Mrs. Behr's affidavit, he had also handed down other Orders favorable to the defendants (App. 7-8) with the result that the Notice of Appeal was attacked as untimely (App. 1-5). Although it was not untimely under the law, particularly the law of this Honorable Court to the effect that the affidavit was sufficient and Judge Marsh's removal should

have been held to be automatic as of the date the affidavit was filed (Petition for Rehearing pp. 3-7), nevertheless the court of appeals sustained Judge Marsh's action thereon by disregarding that part of the argument.

Subsequently, to wit, on August 6, 1956, District Judge Marsh in another action entered an Order (App. 21) disqualifying himself pursuant to Section 144 of the Judicial Code by reason of the affidavit (App. 17-20) of Paul Ginsburg, a party therein, who is Mrs. Behr's attorney herein. The said Order of disqualification of Judge Marsh conflicts with his Order (App. 10) herein striking the affidavit of Plaintiff, and the Order (App. 21) in the other action lends additional support to the affidavit of Plaintiff (App. 7a-10a) herein.

Shortly before the filing of the affidavit of Plaintiff, to wit, on November 16, 1955, Judge Marsh had handed down five Orders in favor of defendant Joseph H. Hirshhorn (App. 7-8), all of which are insupportable and untenable. In the said Orders Judge Marsh (1) granted defendant Joseph H. Hirshhorn's Motion to Set Aside Entry of Defendant arbitrarily and without legal justification, the said default being based upon failure to answer or file an appearance in accordance with the rules and applicable procedure; (2) granted Hirshhorn's Motion to Dismiss the Complaint for lack of jurisdiction over his person, after Hirshhorn had already submitted to the Court's jurisdiction by (a) filing a Motion to Dismiss Complaint after the expiration of the 20 days set forth in the notice to plead, (b) filing a Motion for Extension of Time to Answer Interrogatories, presented in open Court on April 27, 1955, which motion

certainly cannot be made without submitting to the Court's jurisdiction, (c) filing a Motion to Set Aside Entry of Default, all of which pleadings are signed by defendant Hirshhorn's attorneys without limitation of their authority to appear for him; (3) denied plaintiff's Motion Under Rule 37a to have Hirshhorn answer interrogatories which had been served upon him; (4) denied the plaintiff's Motion Under Rule 11 to strike certain allegations of Hirshhorn's Motion to Set Aside Entry of Default which were sham, false and scandalous; (5) denied plaintiff's Motion Under Rules 11 and 12 (f) to strike Hirshhorn's Statement of Reasons for Opposition to Counsel for Plaintiff's Motion to Strike Under Rule 11, as impertinent, misleading, scandalous, in bad faith, incompetent, immaterial and malicious.

Plaintiff's said motions to strike were renewed in the court of appeals in a Motion to Limit the Contents of the Printed Record and to Strike and Suppress Certain Original Papers, alleging that the principal contents of said documents falsify the terms of an arrangement between Mrs. Behr's Counsel and Hirshhorn's New York counsel, Benjamin Heffner, Esquire, wrongfully making it appear that counsel for plaintiff breached the arrangement (thus supporting Hirshhorn's "right" to file late) when the fact is that Heffner breached the arrangement and released counsel for plaintiff. Thus the falsification not only was damaging to plaintiff's counsel but also improperly influenced the courts below against plaintiff's cause. The record (1a-6a, 9a) supports plaintiff's contention that Hirshhorn misrepresented the said arrangement when his Motion to Set Aside Entry of Default contained: "Defendant Joseph H. Hirshhorn's tardiness of three days in filing his Motion to Dismiss

the herein complaint as to himself was based upon his good faith reliance on the verbal agreement between his New York counsel, Benjamin Heffner, Esquire, and plaintiff's counsel, Paul Ginsburg, Esquire, that defendant Joseph H. Hirshhorn would receive an extension of time to respond to the said complaint"; and Attorney Sherman T. Rock's affidavit attached thereto contained: "That Defendant Joseph H. Hirshhorn arranged through his New York counsel, Benjamin Heffner, Esquire, with Paul Ginsburg, Esquire, counsel for Plaintiff's Complaint, to receive an extension of time for responding to said complaint, and in good faith relied thereupon".

On April 27, 1955, in the course of argument Attorney Rock for Hirshhorn stated in his presentation to the court (Tr. p. 2) that "Mr. Heffner, Mr. Hirshhorn's counsel in New York City * * * explained that he had an arrangement with Mr. Ginsburg whereby we would be permitted to file some kind of answer or responsive pleading late"; and further (Tr. p. 3) that "In the meantime I had spoken to Mr. Ginsburg. He confirmed what Mr. Heffner told me about their arrangement to permit late filing. He mentioned at the same time that he had another arrangement with Mr. Heffner whereby our client was to cooperate in the taking of testimony either by deposition or by interrogatories, or some other method". At the same time Mr. Rock stated in open court that he received the aforesaid information from Mr. Heffner via long distance telephone from New York City on the morning of March 28th (Tr. p. 2).

The said arrangement to permit late filing was contingent upon Hirshhorn's answering plaintiff's depositions. When Hirshhorn's counsel failed to live up to the

agreement by refusing to answer plaintiff's interrogatories, plaintiff's counsel was admittedly released from the arrangement to permit late filing.

In view of the foregoing, it is quite evident that Attorney Rock had knowledge of the arrangements between Attorneys Heffner and Ginsburg before he filed Hirshhorn's Motion to Dismiss, and that Heffner was the first to breach; and that subsequently, with the said knowledge, Mr. Rock has referred only to that portion of the arrangements relating to late filing in order to make it appear wrongfully that the breach was caused in bad faith by counsel for plaintiff instead of by New York City counsel for defendant Hirshhorn as was the fact. Important record support for the contention of plaintiff's counsel is found in the affidavit of Daniel L. Tate (App. 5a-6a). The record contains no evidence to the contrary, but merely hearsay statements of the said Pittsburgh attorney for defendant Hirshhorn.

Hirshhorn's Statement of Reasons for Opposition to Counsel for Plaintiff's Motion to Strike under Rule 11 repeats and republishes the said matters complained of as set forth in Hirshhorn's Motion to Set Aside Entry of Default.

It was contended in the courts below that the striking of said two documents filed on behalf of defendant Hirshhorn for being false, impertinent, incompetent and scandalous would have rendered them a nullity and would have cleansed the record of any "basis" for dismissal of the action as to Hirshhorn. It was contended further that the refusal of the courts so to strike conflicted with the decision of the Court of Appeals (App. 22-23) at No. 11,499 in the case of *Paul Ginsburg v. Horace Stern,*

et al., wherein the Court of Appeals entered an order to strike and suppress two documents which are presumptively as well as assertedly true there being no denial of record and which are pertinent.

On behalf of the plaintiff it was contended that the action of her affidavit pursuant to Section 144, filed December 1, 1955, was automatic. Promptly thereafter, to wit, on December 7, 1955, her Motion to Reassign Cause (App. 11) was filed, having attached thereto a Motion for Reconsideration (App. 12) to have the district court reconsider, vacate and hear reargument upon Orders of Judge Marsh.

On December 10, 1955, a motion of defendants other than Hirshhorn to dismiss plaintiff's action was filed, and an Order (App. 11) was entered granting it on January 3, 1956, simply because plaintiff had failed to answer certain interrogatories while waiting to see if the Court would grant her Motion Under Rule 37a to compel defendants to answer her interrogatories first pursuant to her right to discovery as guaranteed by Rule 26a.

On January 13, 1956, Hon. Wallace S. Gourley, Chief District Judge, entered an Order (App. 14) denying plaintiff's motion to reassign the case to another member of the Court other than Hon. Rabe F. Marsh, Jr.

On January 25, 1956, a Motion for Reconsideration (App. 15) was filed for plaintiff, to have the Court reconsider, vacate and hear reargument upon Orders entered by Judge Marsh.

On January 26, 1956, "after due consideration", Judge Marsh entered an Order (App. 16) denying said Motion for Reconsideration.

On February 16, 1956, the Notice of Appeal (App. 16) was filed.

Hon. Rabe F. Marsh, Jr., in his Memorandum (App. 10) which accompanied the Order striking Mrs. Behr's affidavit admitted ". . . mistakes of law in decisions I have made in the past in various phases of this and of another action". Thus Judge Marsh has invited a reversal.

It is significant that Judge Marsh denied his bias and prejudice against the plaintiff's counsel long enough to preside over a total dismissal of plaintiff's action, during which time Judge Marsh brushed aside his denial of plaintiff's rights as mere "mistakes of law". Then, after said dismissal was accomplished, he admitted that all along he was biased and prejudiced against plaintiff's counsel, Paul Ginsburg, Esquire. Furthermore, Judge Marsh's said bias and prejudice is now a matter of Judicial Notice since October 8, 1956. On that day this Honorable Court, at No. 929 October Term, 1955, granted Paul Ginsburg's Motion for Leave to File Appendix to Petition for Rehearing and denied the respondent's Motion to Strike Paul Ginburg's Petition for Rehearing, both of which documents contained his allegations charging Judge Marsh with bias and prejudice against him. Thus the said charges of Paul Ginsburg, Esquire, against Hon. Rabe F. Marsh, Jr., have been given sanction by this Honorable Court.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of appeals relating to the sufficiency and the effect of the affidavit of plaintiff filed pursuant to Section 144 of the Judicial Code is in conflict with applicable decisions of this Honorable Court which has held in the case of *Berger v. United States,* 255 U.S. 22, that such affidavits should be liberally construed and that the action of the affidavit is automatic. In said case the United States Supreme Court (p. 30) rejected the contention of the Solicitor General that the action of the affidavit is not "automatic". The said case laid down the test for determining the sufficiency of an affidavit of personal bias and prejudice, at page 33 as follows: "Of course the reasons and facts for the belief the litigant entertains are an essential part of the affidavit, and must give fair support to the charge of bent of mind that may prevent or impede impartiality of judgment. The affidavit of defendants has that character. The facts and reasons it states are not frivolous or fanciful but substantial and formidable and they have relation to the attitude of Judge Landis' mind toward defendants". The Court continued, page 35, as follows: "We are of opinion, therefore, that an affidavit upon information and belief satisfies the section and that upon its filing, if it show the objectionable inclination or disposition of the judge, which we have said is an essential condition, it is his duty to 'proceed no further' in the case. And in this there is no serious detriment to the administration of justice nor inconvenience worthy of mention, for of what concern is it to a judge to preside in a particular

case; of what concern to other parties to have him so preside? * * *"

In the case of *United States v. Shibley,* 112 F. Supp. 734 (1953), the court held, p. 748, that "The disqualification is automatic if the facts stated in the affidavit are legally sufficient".

In the case of *Allen v. duPont, et al.* (1948) 75 F. Supp. 546, the Court, p. 549, held: "The statute in question should be interpreted liberally. Certainly with its objectives no one can complain, least of all a judge who has any regard for the sanctity and the solemnity of his oath". A liberal construction of plaintiff's affidavit would show personal bias and prejudice not only against her but also in favor of defendants who are represented by attorneys with whom Judge Marsh's brother, Attorney Edward W. Marsh, is associated. (App. 2a-3a, 10a).

The applicable law of Pennsylvania which should also be considered is set forth in the Supreme Court case of *In Re Crawford's Estate,* 160A. 585, 307 Pa. 102. That case holds (p. 107) that there is no repugnance in any of the constitutional and statutory provisions (cited therein) for disqualification of judges; and that they may all stand as treating of different situations requiring a change of venue or the calling in of another judge to hear the case. It also held (pp. 107-8) that a challenge to a judge's qualifications because of prejudice and hostility toward an attorney brings the judge within the meaning of "unable to sit in any matter", and it is therefore within the scope of the Act of June 7, 1917, P.L. 363, Section 3.

Therefore, because the affidavit of plaintiff is sufficient and its action is automatic, the disqualification

of District Judge Rabe F. Marsh, Jr., should be held to be effective as of December 1, 1955, the date of filing of the affidavit. It necessarily follows that Judge Marsh was without jurisdiction to enter any Orders subsequent thereto, particularly his Order (App. 11) granting the motion of defendants other than Hirshhorn to dismiss the action. (Likewise Judge Gourley was without jurisdiction to enter his Orders by reason of the lack of reassignment of the case.) Also, it necessarily follows that the time for filing the Notice of Appeal from the Orders of November 16, 1955, was tolled by the filing of the affidavit on December 1, 1955.

2. The decision of the Court of Appeals in refusing to grant plaintiff's motions to strike and suppress is in conflict with the Federal Rules of Civil Procedure, particularly Rules 11 and 12(f), and the law applicable thereto. Had the Court of Appeals duly considered said motions, it should have granted them and thus rendered the two documents in question filed by defendant Hirshhorn a nullity. Then it would necessarily follow that defendant Hirshhorn would not have any basis for a dismissal of the action and he would not have any escape from the jurisdiction of the Court to which he actually submitted. Under the applicable law defendant Hirshhorn, aside from the foregoing contention, has submitted to the jurisdiction of the Court and does not have any basis for a dismissal.

3. Actually the Court of "Appeals" has unjustly denied Mrs. Behr her right of appeal, and it is respectfully submitted that this Honorable Court should restore that right of which she has been deprived. In support hereof the first two paragraphs of Mrs. Behr's Petition

for Rehearing in the Court of Appeals are reprinted as follows:

On May 18, 1956, the Opinion and Order of this Honorable Court were entered, pursuant to which the motions of the appellees to dismiss the appeal were granted and the appeal dismissed. The last sentence of said Opinion is as follows: "This conclusion makes it unnecessary to deal with a motion filed by the plaintiff to 'limit the contents of the appendix and so forth' ". An examination of said Opinion and Order does not at all disclose the fact that the words "and so forth" have been used to replace the words "and to Strike and Suppress Certain Original Papers", thus giving the mistaken impression that the Court naturally would not limit the contents of the appendix of a dismissed appeal, rather than the real fact that the Court would not first (or at all) pass upon plaintiff's motion to Strike and Suppress Certain Original Papers which should materially affect the Court's consideration of the motions to dismiss the appeal and cause their denial.

Had the Court first considered the plaintiff's said motion, it should have pursuant to the applicable law stricken and suppressed defendant Joseph H. Hirshhorn's Motion to Set Aside Entry of Default and his Statement of Reasons for Opposition to Counsel for Plaintiff's Motion to Strike Under Rule 11, which would cleanse the record and render them a nullity Then it would follow that the appellees' motions to dismiss this appeal would be insupportable and untenable. This Court's refusal so to strike and suppress creates a *conflict* with its decision handed down last year at appeal No. 11,499 in the case of *Paul Ginsburg, Appellant, v. Horace Stern, et al.;* and further may create an *im-*

pression that this Court will discriminatorily strike against but not for Paul Ginsburg, Esquire. The Supreme Court of the United States in the recent case of *In Re Murchison* (1955), 349 U. S. 133, held in its Opinion by Mr. Jusice Black (p. 136) that to perform its highest function in the best way "Justice must satisfy the appearance of Justice". In this connection it is further submitted that the Court overlooked or misapprehended the point that the Orders of the lower court which are the subject of this appeal, are products of bias rather than simply as Judge Marsh admitted in his Opinion, "* * * mistakes of law in decisions I have made in the past in various phases of this and of another action".

4. The decision of the Court of Appeals has violated Mrs. Behr's right to due process of law as guaranteed by the Fifth and Fourteenth Amendments of the Constitution of the United States, by depriving her of her property rights in her shares of stock of Carbon Monoxide Eliminator Corporation, and of her *right to a day in court* in the district court where she is entitled to a trial by jury.

5. The discriminatory action of the Court of Appeals regarding the said motions to strike and suppress, and its complete indifference to the legal effect of her affidavit pursuant to Section 144, are tantamount to a denial of appeal as well as a sanctioning of the district court's departure from the accepted and usual course of judicial proceedings (including denial of plaintiff's right to discovery), so as to call for an exercise of this court's power of supervision pursuant to paragraph 1(b) of Rule 19.

CONCLUSION.

The petition for writ of certiorari should be granted.

Respectfully submitted,

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